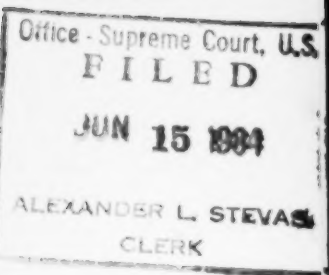


88-2151



No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

WILLIAM O. SKILLERN

Petitioner.

vs.

WILLIAM F. BOLGER, Postmaster
General of the United States

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

IRWIN J. PRINCE
Member of the Supreme Court Bar

SHEILA SUESS KENNEDY
MEARS CRAWFORD KENNEDY &
EICHHOLTZ
120 Monument Circle, Suite 301
Indianapolis, In 46204
Telephone: (317) 634-0992

Attorneys for Petitioner

2036



QUESTIONS PRESENTED FOR REVIEW

I. Whether the Veteran's Preference, established under 5 U.S.C. §3310, confers rights superior to the rights conferred by §§504, 791 and 794 (a) of the Rehabilitation Act of 1973.

II. Whether the Rehabilitation Act of 1973 imposes an affirmative obligation upon governmental agencies to offer employment to handicapped persons otherwise qualified for such employment; and whether the Act's requirement that employers make "reasonable accommodation" of the handicapped requires consideration of handicapped applicants for all available jobs for which they may qualify.

III. Whether the U. S. Post Office carried its burden of proof below, in that no showing was made that Petitioner could not have performed satisfactorily in any of the job categories available.

TABLE OF CONTENTS

	Page:
Questions Presented for Review . .	i
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved . .	3
Statement of the Case	3
A. Nature of the Claim	3
B. Course of Proceedings Below	7
C. Facts Material to the Con- sideration of the Questions Presented	8
Reasons for Allowance of the Writ	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:	Pages:
<u>New Mexico Association for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (1982)</u>	12
<u>Prewitt v. United States Postal Service, 662 F.2d 292 (1981)</u>	11
<u>Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (1981)</u>	11
<u>Stutts v. Freeman, 694 F.2d 666 (1983)</u>	13
<u>Statutes:</u>	
28 U.S.C. §1254	2
29 U.S.C. §791 (b)	3
<u>Rules:</u>	
Rule 17, Supreme Court of the United States	2



No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

WILLIAM O. SKILLERN

Petitioner.

vs.

WILLIAM F. BOLGER,
Postmaster General of the
United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

IRWIN J. PRINCE
Member of the Supreme Court Bar

SHEILA SUESS KENNEDY
MEARS CRAWFORD KENNEDY & EICHHOLTZ
120 Monument Circle, Suite 301
Indianapolis, In 46204
Telephone: (317) 634-0992

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported and appears in the Appendix hereto. The judgment of the United States District Court for the Southern District of Indiana, unreported, also appears in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and Rule 17 of the Rules of this Court.

The decision of the Seventh Circuit was entered on August 9, 1983. This petition is timely filed in that it is filed prior to the expiration of the extension of time granted by the Clerk of the Court on April 9, 1984.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§791 (b)

"Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determined, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals."

STATEMENT OF THE CASE

A. Nature of the Claim

William Skillern sought employment

with the U.S. Postal Service at Indianapolis in January, 1978. He advised the clerk in the personnel department that because he was dyslexic, he required assistance in filling out the application. He was denied this assistance; neither was he permitted to take the application home to seek aid there. (R.49-50). He tried two more times after receiving assurances from postal officials that assistance would be given him, with the same result.

(R.113)

Following the first refusal of assistance, however, Skillern and his vocational counselor were given a tour of the facility to determine whether there were any jobs he could adequately perform. Although it was agreed that the most suitable position would be that

of custodian given Skillern's expertise in that area, Skillern emphasized that he was interested in any position available. He desired the security and improved compensation offered by Postal Service employment so that he could begin expensive and lengthy remedial therapy for his dyslexia. (R.8, R.62) He expressed specific interest in the mailhandler's position since it required little reading and he had successfully held a similar job before. (R.140) Skillern's narcolepsy was controlled by medication and did not constitute a disabling condition. (R.40)

Although both Skillern and his vocational counselor were told that the custodial position was subject to the Veterans Preference Act, neither of them was told that this would be a bar to consideration of Skillern for that

position. On the contrary, they were led to believe that an exception could be made in accordance with the terms of the Rehabilitation Act. (R.15-16)

The Postal Service insisted then and throughout these proceedings that Skillern was best qualified for custodial work, and did not give meaningful consideration to placement in any other job category. Skillern had advised them that he was not a Veteran. During a meeting with the Postmaster, he was informed that the Postmaster personally disapproved the hiring of diabetics; no effort was made to identify a position for which Skillern could qualify through special testing and/or reasonable accommodations. (R.24, R.32)

Skillern subsequently filed a Complaint with the Equal Employment Opportunity office of the Post Office,

and, failing satisfactory resolution of the issue, filed an action in the United States District Court for the Southern District of Indiana. (R.139)

B. Course of Proceedings Below

On April 6, 1983, the United States District Court for the Southern District of Indiana entered a Ruling based upon the Federal Rules of Civil Procedure, Rule 41(b) in favor of the defendants. Although the Court acknowledged that Skillern is handicapped within the meaning of 29 U.S.C. §791 et seq., it found that he had failed to establish a prima facie case and that defendant had met its burden by articulating a legitimate non-discriminatory reason for not hiring Skillern, that being the Veterans Preference Act. The Court held that Skillern had failed to show that the reason was a pretext.

On January 18, 1984, the United States Court of Appeals for the Seventh Circuit affirmed the lower courts decision on the grounds that, even if Skillern had made out a prima facie case, he was obligated to rebut the non-discriminatory justification for the failure to hire him. The Court declined to decide whether the Postal Service was under a duty to take Skillern's application. It further held that, although the Rehabilitation Act did not adopt the Title VII, Section 712 provision concerning Veterans' Preference laws, was obliged to impute this provision would be imputed in actions brought under the Rehabilitation Act.

C. Facts Material to the Questions
Presented

The record below confirms that the Post Office did not consider Skillern

for any position other than custodial, despite his repeated expression of interest in the mail handler's position and his representation that he had successfully held a similar position. At trial, no evidence was introduced which would support a finding that the Post Office had made any affirmative effort to match Skillern with a job he could perform. Instead, the record reflects that Skillern was considered only for the custodian position from which he was foreseeably barred by the interpretation of the Veteran's Preference Law given by Post Office officials (and later by the Seventh Circuit).

REASONS FOR ALLOWANCE OF THE WRIT

THE DECISION BELOW CONSTITUTES A SERIOUS ERROR OF STATUTORY INTERPRETATION IN A CASE OF FIRST IMPRESSION AND INTERPRETS THE REHABILITATION ACT OF 1973 IN A MANNER WHICH CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

The Writ should be granted in order to settle unresolved and significant legal issues which have wide application, and to correct substantial injustice to Petitioner and those who are similarly situated.

The Seventh Circuit Court of Appeals has ruled that the preference given to Veterans is a right and privilege superior to rights conferred upon the handicapped by the Rehabilitation Act of 1973. No precedent was cited for this ruling, and the question would appear to be one of first impression. Certainly, this Court has never addressed the issue.

Even more fundamental, however, is the question of the extent of a govern-

ment agency's duty under the terms of the Rehabilitation Act. The circuits are divided in their approach to this issue, and the related procedural issue of the appropriate burden of proof to be imposed when a complaint is tried under the Act.

The Fifth Circuit Court of Appeals has ruled that a handicapped applicant for federal employment is entitled to de novo review of an adverse administrative decision, once such applicant has exhausted his administrative remedies. Prewitt v. United States Postal Service, 662 F.2d 292 (1981). The Tenth Circuit, in a particularly well-reasoned opinion, Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (1981), held that analysis of claims arising under the Rehabilitation Act must be directed solely to the question whether the Act

has been violated; the rational basis test of equal protection is not the appropriate criterion, and absence of discriminatory intent or the presence of bad faith on the part of the employer are irrelevant. Ruling that a Plaintiff in a Rehabilitation Act case need not carry the burden of establishing "disparate treatment," the Tenth Circuit Court stated:

"The disparate treatment analysis is inapplicable to a claim under §504. ...Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons." Pushkin at 1385.

The Tenth Circuit reaffirmed its holding in Pushkin in New Mexico Association for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (1982). In New Mexico, the Court remanded the case to the district court to determine whether the State had failed to "accommodate and integrate"

handicapped children into physical education and other school programs. Implicit in the remand was the imposition of an affirmative duty to those coming within the protection of the Rehabilitation Act.

The Eleventh Circuit has likewise held that the Rehabilitation Act imposes an affirmative duty upon an employer to provide "reasonable accommodation" to a handicapped applicant for employment. In Stutts v. Freeman, 694 F.2d (1983) the Eleventh Circuit considered the claim of a dyslexic applicant for a position with the Tennessee Valley Authority. The Eleventh Circuit stated in its opinion:

"The policy underlying the Rehabilitation Act of 1973 is clear--'to promote and expand

employment opportunities in the public and private sectors for handicapped individuals'."

Stutts at 668. (emphasis supplied)

The Court reasoned that Congress intended that "entities in its sphere of control" take affirmative efforts to expand employment opportunities for the handicapped, and ruled that the TVA had not satisfied its obligations by "merely" asking for the results of alternative testing methods. The Court acknowledged that Stutts had received better treatment than a non-handicapped individual; nevertheless, it held that the Rehabilitation Act requires more. According to the Eleventh Circuit, "meaningful" accommodation implies an obligation of affirmative action to place the handicapped in jobs.

The decision of the Seventh Circuit in this case is in direct conflict with these decisions of the Fifth, Tenth, and

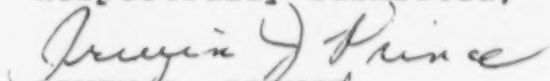
Eleventh Circuits. The Seventh Circuit has declined to impose an affirmative obligation on the United States Post Office and has declined to require that the Post Office meet the burden of proof demanded of Defendants by the other circuits which have considered these issues.

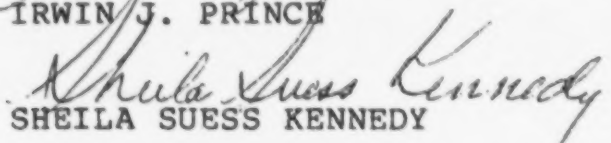
Finally, the decisions of the District Court and the Seventh Circuit work a grave injustice upon the Petitioner. Only this Court can redress that injustice.

CONCLUSION

The Seventh Circuit's decision that the Rehabilitation Act of 1973 confers rights subordinate to those conferred by the Veterans Preference Act is erroneous. Its' decision with respect to the obligations of a governmental employer under the Act are in conflict with decisions of the Fifth, Tenth and Eleventh Circuits. For these reasons, it is respectfully urged that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

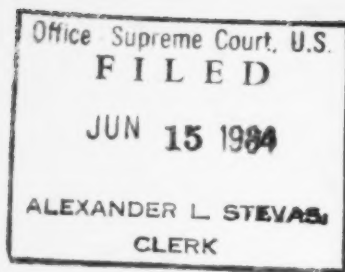
Respectfully submitted,


IRWIN J. PRINCE


SHEILA SUEß KENNEDY

MEARS CRAWFORD KENNEDY &
EICHHOLTZ

88-2151



No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WILLIAM O. SKILLERN

Petitioner.

vs.

WILLIAM F. BOLGER,
Postmaster General of the
United States,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

IRWIN J. PRINCE
Member of the Supreme Court Bar

SHEILA SUESS KENNEDY
MEARS CRAWFORD KENNEDY & EICHHOLTZ
120 Monument Circle, Suite 301
Indianapolis, In 46204
Telephone: (317) 634-0992

271-22

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

WILLIAM O. SKILLERN

Petitioner.

vs.

WILLIAM F. BOLGER, Postmaster
General of the United States

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

IRWIN J. PRINCE
Member of the Supreme Court Bar

SHEILA SUESS KENNEDY
MEARS CRAWFORD KENNEDY &
EICHHOLTZ
120 Monument Circle, Suite 301
Indianapolis, In 46204
Telephone: (317) 634-0992

Attorneys for Petitioner

Exhibit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS, INDIANA

WILLIAM O. SKILLERN,)
)
 Plaintiff,)
)
 vs.)
) No.IP 81-169-C
WILLIAM F. BOLGER,)
POSTMASTER GENERAL OF)
THE UNITED STATES,)
)
 Defendant.)

RULING ON FEDERAL RULES CIVIL PROCEDURE
RULE 41(b) MOTION
FINDINGS OF FACT
CONCLUSIONS OF LAW
JUDGMENT

Findings of Fact

1. William O. Skillern lives in Indianapolis, Indiana. He is handicapped by narcolepsy, a sleeping sickness, and dyslexia, a disability which keeps him from translating the meanings of words. Skillern has never served in the Armed Forces of the United States of America.

2. The disease of narcolepsy is presently controlled by Skillern's

taking 60 mg. of Desoxyn on a daily basis. However, in the event that Skillern fails to take the prescribed dosage, the narcolepsy will become episodic.

3. On or about January, 1978, Skillern visited the Indianapolis Post Office to seek employment. Skillern asked to take an employment application with him because he was unable to complete said application without assistance. This request was refused by the United States Postal Service.

4. On or about January 25, 1978, Skillern contacted Mrs. Janetta DesRoches, a counselor with the Indiana Vocational Rehabilitation Services. Subsequently, Mrs. DesRoches contacted Mr. Jon Wurz, Postmaster, Indianapolis Post Office and arranged a meeting for February 3, 1978.

5. On or about February 3, 1978, a meeting was held at the Indianapolis Post Office and William O. Skillern, Janetta DesRoches, John Wurz and E. Dale Montgomery attended said meeting. At this meeting a mutual determination was made that the position of custodian was the only position at the Post Office for which Skillern could perform. This determination was based upon the limitations created by Skillern's case of dyslexia.

6. Subsequently, on or about February 16, 1978, Mrs. DesRoches submitted a letter to Mr. John Wurz. This letter described Skillern's disabilities.

7. On or about April 28, 1978, Skillern visited Mr. Wurz without an appointment at the Indianapolis Post Office. Mr. Montgomery also attended

this meeting. Mr. Wurz again explained to Mr. Skillern that custodial positions were reserved to preference eligibles and that sufficient numbers of preference eligibles were available to meet the needs of the Indianapolis Post Office.

8. On or about June, 1978, Skillern contacted John J. Buckley, Jr. of the Postal Service's Office of Equal Employment Opportunity in Washington, D.C.

9. Ten months later on or about April 10, 1979, Skillern's attorney at that time, Robert B. Carter, wrote a letter to Mr. Buckley about Skillern's belief that he had suffered handicapped discrimination.

10. Since the letter was addressed to the United States Equal Employment Opportunity Commission, on or about May

3, 1979, Mr. John E. Rayburn, Jr., Director of the Technical Guidance Division of EEOC, replied to Mr. Robert B. Carter. This letter advised Skillern's attorney that his letter of April 10, 1979, had been referred to the Postal Service official whose office handled complaints of discrimination and provided him with written procedures for handling complaints of discrimination in federal employment.

11. On or about June 19, 1979, Mr. Buckley responded to the said April 10, 1979 letter and advised Mr. Carter that to initiate a discrimination complaint, Skillern must first contact an EEO counselor at the postal facility where the alleged discrimination occurred.

12. Subsequently, Skillern contacted Mr. Hurshel Williams, EEO Director for the Indianapolis Post Office. Mr.

Williams instructed Skillern to contact Mrs. Shirley Cannon, the EEO Counselor.

13. On or about August, 1979, Skillern met with Mrs. Shirley Cannon, EEO Counselor for the Indianapolis Post Office, about his complaint of discrimination based on handicap.

14. The meeting with Mrs. Cannon transpired at the Indianapolis Post Office. Mrs. Cannon discussed the fact that Skillern's charge of discrimination may be untimely.

15. On or about August, 1979, Skillern contacted the Office of United States Senator Richard G. Lugar, relative to his allegations of handicapped discrimination against the Postal Service. Senator Lugar's Office forwarded Skillern's letter to the Postal Service and requested a reply.

16. On or about August 20, 1979, the Postal Service replied to Senator Lugar's letter and stated that the position of custodian is restricted to preference eligibles and sufficient numbers of preference eligibles have remained on the eligibility lists. The Postal Service asserted that the Veterans Preference Act was the reason that Skillern was not hired as a custodian.

17. Subsequently, Senator Lugar's Office forwarded the reply of the Postal Service to Skillern.

18. On or about September 11, 1979, Skillern directed a letter to the Indianapolis Post Office in which he expressly stated his interest in a custodial position with the Postal Service.

19. Skillern met with Mrs. Cannon

again on or about September, 1979, wherein she informed him that because of the Veterans Preference Act, the Postal Service could not hire him into a custodial position. She also informed him that there was no exception to this employment practice within the Postal Service.

20. Skillern produced no evidence to show that the Indianapolis Post Office had any openings in the custodial positions.

21. Skillern produced no evidence to show that the Indianapolis Post Office made any hirings into custodial positions since January or February, 1978.

22. Skillern produced no evidence to show that the Postal Service hired any non-preference eligibles in the custodial positions.

23. Skillern produced no evidence to show that the Postal Service completely exhausted the "preference eligibles" on the eligibility lists.

Conclusions of Law

24. The Court assumes jurisdiction over the subject matter and the parties.

25. The United States Postal Service is an "employer" within the meaning of 42 U.S.C. §2000e(b).

26. William F. Bolger, Postmaster General of the United States is the "head of the agency" within the meaning of 42 U.S.C. §2000e-16.

27. William O. Skillern is "handicapped" within the meaning of 29 U.S.C. §791, et seq.

28. The remedies, procedures, and rights set forth in 42 U.S.C. §2000e-16 apply to complaints brought under 29

U.S.C. §791.

29. Nothing contained in Title VII shall be construed to repeal or modify any Federal, State or local law creating special rights or preference for veterans. 42 U.S.C. §2000e-11.

30. In examinations for positions of guards, elevator operators, messengers and custodians in the competitive service, competition is restricted to preference eligibles as long as preference eligibles are available. 5 U.S.C. §3310.

31. The provisions of Title 5 relating to a preference eligible shall apply to an applicant for appointment and any officer or employee of the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive service under such Title 39 U.S.C. §1005(a)(2).

32. The P-11 Handbook of the Postal Service at Chapter 262.111 provides that the position of custodian is restricted to preference eligibles.

33. William O. Skillern is neither a veteran nor a preference eligible within the meaning of the Veterans Preference Act and related statutes, regulations and policies.

34. Skillern has the burden of establishing a prima facie case of discrimination based on handicap. When plaintiff fails to meet this burden, the case must be dismissed for failure to state a claim upon which relief can be granted. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

35. Skillern failed to prove a prima facie case of discrimination based on handicap. He failed to prove that he

that he was qualified for a job which the employer was seeking applicants. Skillern failed to prove that any custodial vacancies existed which he could have filled. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

36. Assuming arguendo, that Skillern pursued a prima facie case, then the defendant articulated a legitimate non-discriminatory reason for failing to hire Skillern. Burdine, supra, at 248 and McDonnell Douglas, supra, at 802. That is, the Postal Service articulated that the custodial position in question is restricted to preference eligibles. Skillern failed to show that the legitimate non-discriminatory reason was a pretext. Burdine, supra, at 256 and McDonnell Douglas, supra at 804-805.

37. Any of the above findings of fact that may be construed as conclusions of law shall be deemed conclusions of law, and any of the above conclusions of law that may be construed as findings of fact shall be deemed findings of fact.

38. The defendant's Motion to Dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure is GRANTED and the action should be DISMISSED WITH PREJUDICE.

Judgment

It is ADJUDGED that the plaintiff recover nothing from the defendant and that the action is DISMISSED WITH PREJUDICE.

Dated this 6 day of April, 1983.

/s/ Cale J. Holder, Judge,
United States District
Court Southern District
of Indiana

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 83-1884

WILLIAM O. SKILLERN,

Plaintiff-Appellant,

v.

WILLIAM F. BOLGER, Postmaster General
of the United States,

Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of
Indiana, Indianapolis Division.
No. IP 81-169-C-Cale J. Holder, Judge.

ARGUED DECEMBER 13, 1983-DECIDED
JANUARY 18, 1984

Before CUMMINGS, Chief Judge,
ESCHBACH and COFFEY, Circuit Judges.

CUMMINGS, Chief Judge. Plaintiff William O. Skillern appeals the involuntary dismissal of his civil rights complaint brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and the Rehabilitation Act of 1973, 29 U.S.C. §791 et seq. We affirm.

This 1981 action grows out of plaintiff's inability to obtain employment as a janitor with the Post Office. He first sought such employment in January 1978. Because Skillern suffers from dyslexia, a reading disability which causes great difficulty in comprehending written words, he could not complete the employment application form from the Post Office without assistance. After Skillern was refused permission to take an application home, he contacted his vocational rehabilitation counselor and a February 1978 meeting with postal officials was arranged. At the meeting the parties agreed that Skillern's disability limited his job suitability to the position of custodian. The Post Office normally filled openings for this

position through a competitive examination that was restricted to veterans. It had, however, created an alternate hiring register for the severely handicapped and officials offered to assist Skillern, a non-veteran, in getting his name placed on this list. Despite providing officials with all the information they requested. Skillern was never permitted to apply for the job.¹ After repeated unsuccessful attempts to gain employment as a janitor, Skillern filed this lawsuit seeking, inter alia, an order requiring defendant to hire him and an award for damages.

¹ In a letter dated September 5, 1980, defendant did offer to add plaintiff's name to the hiring register for the severely handicapped in settlement of his discrimination complaint. This offer was refused.

A bench trial was held. After Skillern presented his case in chief, defendant moved for an involuntary dismissal under Rule 41(b), Federal Rules of Civil Procedure. The trial court granted the motion and issued findings of fact and conclusions of law as required by Rule 52(a), Federal Rules of Civil Procedure. This appeal followed.

It is well settled that a Rule 41(b) dismissal of an employment discrimination complaint at the close of plaintiff's case in chief is proper "if the record...contains the defendant's reasons for its actions, and if the evidence in the record is sufficient to support a judgment in the defendant's favor." Ekanem v. The Health and Hospital Corp., Nos. 80-2835, 81-1963,

slip op. at 5 (7th Cir.Dec. 14, 1983). See also Bugg v. International Union of Allied Industrial Workers, 674 F.2d 595, 599 n.6 (7th Cir. 1982); Gaballah v. Johnson, 629 F.2d 1191, 1200 (7th Cir.1980); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281-82 (7th Cir. 1977). Evidence adduced at trial indicates (1) that the Veterans Preference Act of 1944 restricts Post Office hirings for custodial positions to veterans so long as veterans remain available,² (2) that Skillern was not a

² See 5 U.S.C. §3310. The Veterans' Preference Act restricts the competitive examination for custodial positions to "preference eligibles," who are defined as veterans and certain of their privies. See 20 C.F.R. 2018 (1980). The preferences mandated by the Act apply to Post Office hirings. See 39 U.S.C. §1005(a)(2).

veteran, and (3) that the Post Office had on file a surfeit of applications from veterans. Even assuming that Skillern made out a prima facie case of discrimination,³ he needed to rebut this legitimate non-discrimina-

²Plaintiff points out that defendant created an alternate hiring register for the severely handicapped which eliminated the requirement that applicants take an examination. He appears to assert that veterans receive no preference on this special register and that defendant's failure to hire him cannot be justified on this basis. Contrary to plaintiff's belief, selections from the special register do follow a preference system which favors veterans. See P-11 Handbook of the Postal Service §§261.338, 261.343, and 262.111.

³ The Court need not decide whether Skillern made out a prima facie case of discrimination since this appeal comes before it on a Rule 41(b) motion. Cf. Ellis v. Carter, 328 F.2d 573 (9th Cir. 1964).

tory justification for defendant's failure to hire him. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). This he failed to do. Skillern did not present one shred of evidence that the real reason he was not hired grew out of his handicap and not his failure to have served in the armed forces; he did not even produce evidence that defendant hired any custodians, let alone non-veteran applicants, during the period he sought employment.⁴

⁴ In a strict sense, Skillern could not have been hired before the Post Office took his application and it is this failure to permit him to apply for that position that forms the gist of his complaint. We need not decide whether the Post Office must accept his application since it has already offered to place his name on the hiring register for the severely handicapped.

Moreover, terms of the very laws under which plaintiff sues preclude the attack he launches against defendant's hiring practices. Section 712 of Title VII provides that "[n]othing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preferences for veterans." 42 U.S.C. §2000e-11. Skillern's invocation of Title VII to circumvent the veterans' preference of the Post Office would work exactly the sort of modification that Congress did not intend the statute to bring about. See Bannerman v. Department of Youth Authority, 436 F.Supp. 1273 (N.D.Cal. 1977), aff'd, 615 F.2d 847 (9th Cir. 1980).

Nor can plaintiff recover under the Rehabilitation Act. Congress created an explicit right of action for victims of employment discrimination due to handicap in Section 505 of that Act. That section protects rights and provides remedies in terms of provisions of Title VII.⁵ While Section 505 does not

⁵ Section 505 of the Rehabilitation Act provides that

[the] remedies, procedures and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §2000e-16], including the application of sections 706(f) through 706(k) [43 U.S.C.A. §2000e5(f) through (k)], shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint or by the failure to take final action on such complaint....
29U.S.C. §794a(a)(1).

specifically adopt the Title VII section 712 provision concerning conflicts with veterans' preference laws, supra, failure to impute that provision to actions brought under the Rehabilitation Act would effectively expand the reach of the Rehabilitation Act beyond that of Title VII. Congress clearly did not intend such a result. See S. Rep. No. 820, 95th Cong., 2d Sess. 18-19 (1978) and H. Conf. Rep. No. 1780, 95th Cong., 2d Sess. 93, reprinted in 1978 U.S. Code Cong. & Ad. News 7374 (1978). Thus, neither of the statutes under which plaintiff sues can provide him with relief.⁶ Accordingly, the decision

⁶ We do not understand plaintiff to be challenging the constitutionality of the Veterans' Preference Act. Nevertheless, we note that the Supreme Court has upheld a similar Massachusetts statute in the face of an equal protection challenge. See Personnel

is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

6 Administrator of Massachusetts v.
Feeney, 442
U.S. 256 (1979).

